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GOVERNMENT BY EXECUTIVE RULINGS.

BY ALBERT DEAN CURRIER.

THE recent extensive exercise of the power of Congress "to regulate commerce," etc., under the provisions of the Constitution, has revived, at this time, a close scrutiny and study of the letter and spirit of our national Constitution, not only by our statesmen, but also by all persons who are interested in good government. The rapid growth of Federal power involves not only the power of Congress, under some attempted constructions of the Constitution, to enact general laws which frequently clash with the laws of the States, but also involves the rapidly increasing practice by Congress of delegating to the executive heads of governmental departments the power to exercise functions which properly belong to the legislative and judicial branches of the Government.

The people of the United States are a very busy people, interested in the progress of their individual affairs. They are so busy that they are inclined to leave the study and enforcement of those principles which make for good government to those who make politics their business. So great has become this *laissez-faire* policy of the people, and so great has been their faith in the executive officials of the Government, that they have not fully realized the rapid growth of the executive branch of our Government, which is silently and surely usurping many of the functions of government that properly belong to the legislative and judicial branches. This growth of power in the executive branch appears to be due, principally, to the tendency of the legislative branch of the Government, as heretofore mentioned, to delegate to the executive heads of departments the power to make "Rules and Regulations" under general laws enacted by Congress, with power to interpret such laws wherein they may appear ambiguous or silent upon specific matters.

Great successes frequently induce overconfidence and a relaxation of those virtues which constitute the foundation of success. This is as true in the case of nations as in the case of individual persons. "Eternal vigilance is the price of liberty."

Patriotic faith in the Government under which we live is commendable; but may not the faith of the people of the United States in "the Government" have become so great that a man who holds a commission as executive head of any department of "the Government" may be, in the eyes of the people, thereby endowed with infallibility and righteousness almost divine? Does not a trace of the old sentiment, "The king can do no wrong," still lurk in many minds?

It appears to be generally conceded, throughout the broad field of political science, that the best form of government is that which best preserves civil liberty and self-government, and which at the same time best provides for the common welfare and common defence of *all* the people within its domain.

In the various processes of the reorganization of social and political governments after the dark ages of mediæval history, during which period only the feudal system obtained supremacy and liberty was denied to all except a few, monarchical and aristocratic forms of government quickly developed into absolute despotisms and the worst form of oligarchies; while so-called republics, including even the commonwealth of England in the seventeenth century, rapidly deteriorated into disorganized and belligerent factions, which eventually became reorganized as monarchies or as aristocracies.

Gradually, through the growth of popular education and the general enlightenment of the people, constitutional forms of government began to appear and, in England, by the exercise of the proper checks and balances provided in its constitutional form of government, the power of the king was gradually lessened, and the people approached a more democratic form of government through the House of Commons. Through the growth of religious liberty, a more popular education and the influence of the printing-press during the latter part of the eighteenth century, the doctrine of true democracy and the capacity for self-government obtained a much firmer foothold, particularly in the new American colonies.

The American colonists inherited many of the English forms

of government, but during the period of the American Revolution we find that, through the rapid spread of the principles of civil liberty and self-government and the exercise of local forms of government, the people of the thirteen original States of our Union developed a great antipathy to the monarchical features of the English Government, until, at the time of adoption of the Articles of Confederation in the year 1778, we find the popular legislative bodies in nearly all the States exercising supreme power.

By the Articles of Confederation nearly all the powers of the States were apparently conferred upon a single legislative body, the Continental Congress, without the establishment of branches for the exercise of certain functions, but with the reservation to the several States of certain powers which might properly have been conferred upon the Federal Government. Like the so-called republics of ancient Greece and Rome, the popular legislative body lacked, to a certain extent, the spirit of unity, and was characterized by the absence of proper constitutional checks and balances.

After the people had obtained their national independence by the war of the American Revolution, we find the representatives of the States assembled in the Constitutional Convention of 1787 for the purpose of framing and adopting a Constitution which, in the words of the preamble thereto, was intended "to form a more perfect Union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare and secure the blessings of liberty to ourselves and our posterity." This Constitution which, on March 4th, 1789, had been ratified by eleven of the States, established, for the purpose of maintaining the equilibrium and stability of the new Government, three grand divisions in the following order: the Legislative, the Executive and the Judicial,—the powers of each of which were separately defined. The Government so formed was a republican form of government, but it appears to have been clearly recognized by the framers of the Constitution that a republican form of Government may, through the lack of constitutional checks and balances, vary from a pure democracy to a most exclusive oligarchy. That it was the intent of the framers of the Constitution, who represented the people of the original States, to eventually develop, through

the exercise of political rights by the people and through popular education as to the principles of civil liberty, a more democratic form of Government in which all the people should be fully and justly represented, there can be no doubt. With this intent the Constitution of 1787 was adopted. The representatives of the people of the original thirteen States had, during the struggles of the States for independence, acquired a rare experience and knowledge as to the rights of the people and the manner in which such rights might be best preserved. All of their vast experience and wisdom thus obtained was crystallized in that famous document, the Constitution of the United States. It is true that there were some matters upon which the representatives in the Constitutional Convention failed to agree, particularly as to such rights as should be reserved to the several States, but they wisely provided that the Constitution might thereafter be amended by the concurrence of two-thirds of both Houses of Congress, when ratified by three-fourths of the several States. There appears to be no doubt that the framers of the Constitution realized that a Government with all its powers concentrated in any one of the three grand branches of the Government, either the Legislative, Executive or Judicial, must necessarily become an arbitrary Government; and it is manifestly the spirit and intent of the Constitution that the functions of these three grand branches of our Government should be exercised separately and independently, yet, so far as possible, in harmony with each other. By the Amendments to the Constitution the spirit of personal rights and civil liberty is emphasized.

The Constitution vests the executive power of the Government in the President of the United States, but, inasmuch as it is physically impossible for one person to perform all the executive duties and functions of the Government, Congress has prescribed by statutory laws (Secs. 158 to 161, inclusive, of the United States Statutes) that the executive functions shall be distributed among "executive departments"; and it is also prescribed (Sec. 161, United States Statutes) that "the head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use and preservation of the records, papers and property appertaining to it." The direction of the President is

to be presumed in all the instructions and rules issuing from the competent departments.*

Although the Constitution and the statutes creating such executive offices do not anticipate or legally permit the promulgation of regulations except for the purpose of enforcing such rights, duties and obligations as are clearly defined by statute, yet, in those specific matters upon which the Federal statutes are ambiguous or silent, by virtue of the discretionary power vested in the executive heads of departments by Congress and the authority delegated to such executive officers by certain acts of Congress, portions of the laws are interpreted by executive officials, and the deficiencies in such laws are supplied by executive rulings thereon. Such executive rulings are often based upon forced and strained constructions of the statutory laws.

In recent years, the extensive and rapid growth of all sorts of industries and business pursuits in the United States has imposed, both upon the State Legislatures and Congress, duties which require much expert knowledge in the framing of just laws. Congressional Committees rely greatly for recommendation and advice upon departmental officials, who are often inclined to recommend the delegation of more authority and greater discretionary power to the executive heads of departments. The public too often fails in properly advising its representatives in Congress, especially upon matters which require technical knowledge, and the experts who represent various industries before Congressional Committees are frequently regarded as being prejudiced in favor of private interests. Thus, many specific questions which should be determined by Congress and which should be adjusted by proper Congressional Acts, are, by the terms of the Acts themselves, left to the executive heads of departments to be determined and enforced by them.

The exercise of such discretionary power by the executive heads of departments involves, *first*, a legal interpretation of the laws, which is a judicial function, and, *second*, the preparation and adoption of rules and regulations thereunder, which are properly legislative functions.

Such rulings by the executive head of any department may

* See *Wilcox vs. Jackson*, 13 Pet. (U. S.) 513; *Confiscation Cases*, 20 Wall. (U. S.) 92; *Wolsey vs. Chapman*, 101 U. S. 769; *U. S. vs. Fletcher*, 148 U. S. 89 and other legal authorities.

have the effect of destroying one class of industries and the building up of another class.

As an example of such power, a commission of the executive branch of the Government consisting of the Secretary of the Treasury, the Secretary of Agriculture and the Secretary of Commerce and Labor, may, by virtue of the extraordinary discretionary powers vested in it under the Food and Drugs Act of 1906, in any ruling which it may see fit to promulgate, prohibit the manufacture and sale of some articles of food which it considers adulterated, but which many food experts may have decided to be wholesome and free from deleterious substances. It may prohibit the use of a label bearing the name by which such article has for many years been known to the public, if it considers such label to be false or misleading, although the majority of the people, and even the minority of the commission who have had a more extensive experience and knowledge in connection with the same, may dissent from its opinion. The same executive commission may, by virtue of its authority, under the same law, prohibit the use of labels which are duly registered trade marks, thereby destroying the use of properties which, by reason of long use, have become valuable assets of the parties which have so used them.

Under the Congressional Appropriation Act of 1907, the Secretary of Agriculture may, "whenever he has reason to believe that any articles are being imported from foreign countries which are dangerous to the health of the people of the United States," request the Secretary of the Treasury to refuse delivery of such articles to the consignee; and such request is mandatory upon the Secretary of the Treasury. It is true that these specific Acts now referred to provide that manufacturers and importers of food who may be accused of violations of such rules and regulations shall be granted hearings before the executive head of the Agricultural Department, but the decision of the question of criminal prosecution lies wholly with such executive official. On the other hand, the Secretary of Agriculture may, in his discretion, neglect or refuse to enforce the manifest purpose and intent of the laws above referred to, if he so desires.

Similar conditions prevail to a greater or less extent in nearly all executive departments of the Government, and the Federal courts cannot issue a writ of mandamus to compel an executive

head of a department to perform his duties in accordance with the manifest purpose of an Act of Congress, as to those specific matters in which discretionary power has been delegated to such executive by such Act.*

A certain condition of affairs, alleged to have arisen under the powers granted to the executive head of the Post-office Department to make "rules and regulations," is well described in a memorable speech delivered by the Hon. Edward Dean Crumpacker, a member of Congress from Indiana, before the House of Representatives on April 11th, 1906, in discussing the Post-office Appropriation Bill then before the House, from which speech, as it appears in the Congressional Record, the following extracts are quoted:

"MR. CRUMPACKER. I understand there is a system of penalties imposed by the regulations of the Post-office Department. The gentleman must remember that that Department has legislative, executive and judicial powers combined. It exercises all the powers of the Government over the postal business of the country. . . .

"The criticism that I am making is of the law and not of the officers, because I assume that they are performing their duties in accordance with the postal regulations or the law. I do not know which it is; possibly it may be both. . . .

"There is a system of postal espionage in this country that is absolutely inconsistent with the spirit of free institutions, and it is not what should be expected in a land of law and liberty.

"Post-office inspectors may lodge complaints with the Postmaster-General that the business of an individual is fraudulent. The Postmaster-General may be satisfied from the secret reports of the inspectors that there are some irregularities in the character of the business the particular individual is conducting, and he may peremptorily enter a fraud order and withhold from that individual the privileges of the mails, absolutely ruining his business and blasting forever his business reputation. When that citizen calls upon the Postmaster-General, asking permission to see the charges that have been made against him, he is informed that they are confidential and is refused the privilege."

There have also been many bitter complaints from a large number of citizens as to alleged unjust rulings by the executive officials of the Department of the Interior as to the methods of the disposition of certain Government lands, concerning which Congress has given to the Secretary of the Interior discretionary powers.

* See U. S. *vs.* Blaine, 139 U. S. 306; U. S. *vs.* Guthrie, 17 How. (U. S.) 284 and other citations thereunder.

Recently a ruling issued by the Secretary of Agriculture proclaimed, in apparent contradiction to the intent and purpose of the Food and Drugs Act of 1906, that butter is exempt from certain provisions of the Act referred to, while other articles of food and drink are not favored with such exemption. This ruling is alleged to have been based upon a technical definition of the term by which the product referred to is usually known, created in a Congressional Act of a radically different nature and purpose over twenty years ago, which definition was so created by the words of that Act itself "for the purpose of this Act." Although often requested so to do, the executive head of the department referred to has refused to submit the legal phase of this question to the Department of Justice for an opinion thereon.

Congress frequently delegates to executive officials authority not only to make rules and regulations as to the conduct of the general *executive* business of their departments, but also delegates discretionary power in the promulgation of rules and regulations under certain statutory laws with reference to matters which are not specifically mentioned in such laws.

And the rules and regulations promulgated by executive heads of departments are endowed with the full force and effect of law, and are to be so regarded until the courts shall have decided that they are inconsistent with the statutory laws. Where the language in a statute is ambiguous and open to different interpretations, the construction put upon it by the executive department is regarded as decisive.*

Moreover, violations of the rules and regulations promulgated by the executive heads of departments, thus having the force and effect of law, are frequently punishable by severe penalties prescribed in general statutory Acts. Generally there is no provision for direct appeal by the accused person to the courts from such executive rulings. Persons who may believe that injustice has been done, that they have been discriminated against by such rules and regulations and that such rulings are not consistent with the statutory laws, must submit to the injustice, by compliance, or to the only alternative, which is an indictment and criminal prosecution for an alleged violation of such rules and

* See *Brown vs. U. S.*, 113 U. S. 568; *St. Paul, Minnesota, etc., Ry. Co. vs. Phelps*, 137 U. S. 528, and other citations thereunder.

regulations. Again, the rules and regulations prescribed today by an executive official may be stricken out and a new set of rules and regulations promulgated by him to-morrow, concerning the same subject. This may be done without any alteration whatever of the statutory laws, but simply by reason of a new interpretation of the law by the executive officer to whom the power to make rules and regulations is delegated by Congress.

Thus we may have the aspect of one person being subjected to a criminal prosecution, to-day, and perhaps sentenced to years of imprisonment, for the violation of an executive ruling; while another person may, to-morrow, commit the same act with impunity under new executive rulings, under the same statutory law. What can be more repugnant to the letter and spirit of our national Constitution?

In one division of the Treasury Department, the Division of Customs, the exercise of discretionary power by executive officials formerly worked so much injustice in the appraisal of importations under the tariff schedule that Congress found it necessary, under pressure of a popular demand, to create by the act of June 10th, 1890, a Board of General Appraisers, from whose decisions the importer may, under certain conditions, apply to the Circuit Court of the United States for a review of the questions of law and fact involved. However, there appears to be no such provision for appeal to the courts from the rulings of the Commissioner of Internal Revenue, when approved by the Secretary of the Treasury; and it was only after a gigantic struggle in Congressional Committees and upon the floors of both Houses of Congress that the Act of Congress for the enlargement of the powers of the Interstate Commerce Commission, approved June 29th, 1906, was so amended as to provide an appeal to the courts, under certain conditions, from the decisions of the Interstate Commerce Commission, which Commission is practically a part of the executive branch of the Government.

In accepting delegated powers to construe Congressional acts which are general in their scope, and to make rules and regulations thereunder, the executive branch of the Government assumes great responsibilities and arbitrary power. Yet the Chief Executive of our Government is apparently requesting that Congress shall delegate still greater discretionary powers to the executive heads of Government departments.

It was, perhaps, with a sense of such responsibility that the Hon. John W. Yerkes, Commissioner of Internal Revenue, when his advice was requested by the Committee on Ways and Means in the House of Representatives on February 7th, 1906, in consideration of the House Bill relating to free alcohol in the arts and manufactures, said: "I do not want a general bill, leaving everything to be determined as to methods, modes, processes, rules and regulations by the Department." In connection with the same bill, when he appeared before the Senate Committee on Finance on May 5th, 1906, he repeated the same statement, and further said: "There was my view with regard to the bill, and it indicates clearly that I did not want the scope of power and authority that is given under the House Bill."

It may, therefore, be noted that not all the executive officials of the Government are seeking greater discretionary powers in their respective departments.

The foregoing paragraphs are probably sufficient to indicate the general tendency of the executive branch of our Government to usurp the powers and functions of the legislative and judicial branches.

It is the belief of many of our best statesmen that the true intent and spirit of the Constitution are thus being thwarted, and that the fundamental principles of our Government are thus being gradually undermined.

Congress, as a body, appears to be slow to recognize the evils which result from the delegation of its powers to the executive branch of the Government. The judiciary conservatively guards against encroachments upon the legislative and executive branches of the Government, and generally refrains from interfering with the discretionary powers delegated by Congress to the executive heads of departments.

Upon a review of these conditions, questions naturally arise as to the proper remedy for the evils which thus appear. Is Congress, burdened with its multiplying duties, able to enact all the laws demanded by the people in forms so clear and specific, as to all the new problems of our rapidly growing industries and general business interests, that rulings by executive heads of departments shall be unnecessary, except as to the conduct of the persons working under them and the purely executive business of their respective departments? Is the executive branch of our

Government exercising functions in excess of its constitutional powers? Are the citizens of our country performing their civic duties in fully and properly advising their representatives in Congress, and insisting upon proper legislation? Are the people of the various States neglecting the studies of political science and the practice of those civic virtues which make for good government? Are we to give the constitutional powers of the legislative and judicial branches of our Government, wholly or in part, into the hands of the executive?

The Hon. Elihu Root says, in his recent admirable book on "The Citizen's Part in Government":

"More than all, our hopes must depend upon the general and active participation of the whole governing body of the American democracy in working out the problems and applying the principles of government with wisdom, with integrity, with just and kindly consideration for the rights of others—every citizen doing his full and manly duty for his country."

The sovereignty which is vested in the people may be maintained only by its proper exercise. Should we not, therefore, in the interests of personal rights and civil liberty, strive to abolish the evils of our political system as they appear, to the end "that the Government of the people, by the people, and for the people, shall not perish from the earth"?.

ALBERT DEAN CURRIER.